Supreme Court, U.S.
FILED

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No

In The

Supreme Court of the United States

Li-Lan Tsai,

Petitioner, pro se

v.

The Rockefeller University,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the
Second Circuit

PETITION FOR WRIT OF CERTIORARI

Li-Lan Tsai, Petitioner, pro se
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54 pp

Questions Presented for Review

I. Whether the United States Court of Appeals for the Second Circuit properly issued summary order, affirmed the judgment of the District Court and dismissing Tsai's claims as untimely.

A. Whether the District Court properly held that tolling was not warranted for people receiving Social Security Disability Benefit because it "indicated" that the person was capable of protecting his/her legal rights.

B. Whether the District Court overlooked the point that termination of Tsai's employment was not the University's last discriminatory act, therefore, Tsai's Complaint was indeed not time-barred.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF CONTENTS.....ii

INDEX OF APPENDICES.....iii

OPINIONS BELOW AND JURISDICTION.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS.....4

ARGUMENT.....8

Point I-The district court was not proper in granting summary judgment because the existence of exceptional circumstances and tolling is warranted when there an issue of the statutory filing period.

Point II- The district court overlooked the point that termination of Tsai's employment was not the University's last discriminatory act, therefore, Tsai's complaint was indeed not time-barred.

CONCLUSION.....16

INDEX OF APPENDICES

Page

Appendix A. Decision of the United States Court of Appeals (September 12, 2002).....A-1

Appendix B. Decision of the United States District Court (February 14, 2002).....A-4

Appendix C. Decision of the United States District Court (February 7, 2001).....A-19

Appendix D. Decision of the United States Court of Appeals on motion for attachment of appendix/addendum (October 8, 2002).....A-33

Appendix E. Decision of the United States Court of Appeals on Petition for Rehearing (October 18, 2002).....A-34

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The summary order of the United States court of appeals appears at appendix A to the petition and is unpublished. (September 12, 2002).

The opinion and order of the United States district court appears at appendix B to the petition and is unpublished (February 14, 2002).

The opinion and order of the United States district court appears at appendix C to the petition and is unpublished (February 7, 2001).

JURISDICTION

The date on which the United States Court of Appeals decided my case was September 12, 2002.

A timely petition for rehearing was denied by the United States Court of Appeals on October 18,2002, and a copy of the order denying rehearing appears at appendix D and E.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1)

STATEMENT OF THE CASE

(i) Nature of the Case.

The petition, filed by me, Li-Lan Tsai. ("Tsai"), arises out of an action by me against my former employer, The Rockefeller University ("University"), under the American with Disabilities Act of 1990("ADA"), 42 U.S.C.§12112 et seq., and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.§2000 et seq. The University discriminated against me because of my race, gender, disabilities, and ultimately terminated me when I opposed the unlawful employment practice and was diagnosed with liver cirrhosis.

Overwhelmed with such extraordinary misconduct, I suffered severe post-traumatic stress disorder complicated by a life-threatening illness. I filed charge with EEOC on October 14, 1999 based on the information EEOC provided, which was nearly three years after my termination.

(ii)Course of Proceedings and Disposition in the District Court and the United States Court of Appeals.

1/18/2000–Tsai, pro se, filed a complaint against the University alleging causes of action under the ADA and Title VII. The University moved to dismiss the Complaint on the grounds that Tsai's claims were time-barred.

2/7/2001– The United States District Court, Southern District of New York, denied defendant's motion in its entirety. Opinion & Order by Honorable Judge Scheindlin. (Please see appendix C.)

5/11/2001– Amended Complaint filed and issue was joined. Law office of Robert Danzi was substituted as counsel for plaintiff, as a service to bar & bench.

6/29/2001– Settlement conference. No agreement was reached.

10/31/2001–Discovery, limited to the issue of the statute of limitations, was ordered. Defendant moved to file summary judgment.

2/14/2001–Defendant's motion for summary judgment was granted and this case was dismissed (Please see appendix B).

3/4/2002 – Plaintiff-appellant, pro se, filed notice of appeal to the United States Court of Appeals for the Second Circuit.

4/26/2002– Brief and appendix filed by Plaintiff-Appellant.

8/26/2002– Oral argument for points/facts overlooked.

9/12/2002– Summary order issued by the Court of Appeals, affirmed the judgment of the District Court (Please see Appendix A).

9/26/2002– Plaintiff-Appellant filed petition for rehearing with motion for attachment of Appendix/Addendum.

10/8/2002– Motion for addendum was denied.

10/18/2002-Petition for rehearing was denied.

1/14/2003– Tsai, pro se, files petition for writ of certiorari to the Supreme Court of the United States.

STATEMENT OF THE FACTS

Preliminary Statement

I started working at The Rockefeller University since September, 1978, and was offered a new position in July, 1993 when the previous position was eliminated.

Shiff, newly arrived at the University, recruited me for helping establish a new lab, in the meantime immediately started projects in another lab at Cornell University two blocks away.

Shortly after working with Shiff, over twelve hours a day between two universities, I have had frequent bronchitis and other respiratory symptoms (severe cough, loss of voice and shortness of breath), along with newly developed knee problem (Torn meniscus & swollen joint).

I was denied of time-off for medical care and accommodation for lighter duty upon tending physician's request. When Shiff wrote a defamatory letter to the personnel office, and I was denied of a job transfer, the retaliation began until eventually a wrongful termination.

Nevertheless, the University's discriminatory and retaliatory behavior continued after the termination of my employment.

Facts

8/16/93-Terms offered for a position in Shiff's lab:

(1)Salary stayed the same as previous position with regular cost-of-living increase for FY93-94, starting July 1st. 1993

(2) Vacation days accrued from FY 92-93 will be carried over to the current term (23 days plus 2 floating holidays)

(3)Title: senior assistant for research.

3/23/1994–Shiff wrote a defamatory letter to personnel office and me when I requested vacation time on 3/28-31/94. For the past eight months, I had been ill frequently due to respiratory problems.

3/24/1994–Personnel office denied my requests for job transfer. Shiff promised me an expunge letter for me to stay in his . (without the expunge letter, I would be on probation, based on the defamatory letter). The expunge letter was never given to me upon several requests in the months of April, May.... way into August, 1994. Until July, 1996 while we tried to resolve the pay and vacation day discrepancies among other problems. It was dated 4/7/95, a year after he promised. It is not hard to perceive under what constant threat and pressure I was from 3/94 to 7/96, and the situation was continuously getting worse.

11/94 Prolonged standing and heavy weight lifting on the job, my right knee started to give in. Accommodation upon my physician's written requests for light duty was never granted.

4/95– Knee's condition worsened, resulted in great difficulty to stand or change positions. Rehabilitation often was denied by Shiff with threatening of my job security.

5/95– MRI -Suggested surgery. Shiff threatened: "You don't have to listen to your doctor", "You have to think how much time you have to take off...". Meanwhile, a male Caucasian colleague with identical condition, was taking leave with full pay for surgery and

rehabilitation.

5/95– Upon numerous requests, e-mail was finally available to me thru another colleagues' plea form, which Shiff was using to announce agenda and was available to all others.

6/4/96- Tissue culture room had been contaminated with radioactive material for two weeks- a room I worked in daily. Shiff casually mentioned about this incident during a group meeting. I requested a survey meter for that room for safety measure. It was denied.

6/96 – Ventilation situation was in the same manner. Safety cabinet was not functioning properly, nor was it certified for use. The prolonged exposure to carcinogenic solvent, xylene, resulted in the emergence of all kinds of respiratory problems.

6/17/96-Shiff admitted that he deliberately left a radioactive vial out in the open just to see "who discovered it first" - Upon my reporting to him about the incident. I was numbed. Imagine under what terror I went to work everyday. Years later, the horrible 9/11 tragedy happened, when I read all the news, anthrax threat, I was in tears. It was another form of terrorism at workplace.

7/5/96-And on 7/16, 24, 30/96, when I didn't receive cost-of - living increase on my pay check, he replied vaguely,: "I'll look into it", " I'll take care of it.", "I did not think about it yet."

8/8/96-Another defamatory letter to personnel department from Shiff, again just prior to my vacation time 8/19/96 which I had requested in April. According to the letter, I pointed out that it was not a merit increase, but a cost-of-living increase for all. Shiff replied: "I

was given the power to do anything I want." And "I have to practice on someone."

9/24/96-9/27/96 Several discussions and disputes over the discrepancy of our records on vacation days. Shiff agreed that I had accrued 43 vacation days. He put down in writing and told me I would see the cost-of-living increase at beginning of the October pay check.

9/30/96-I informed personnel of Shiff's acknowledgment. Later, Shiff called me to his office and told me: "I decide not to give you the vacation days."

10/96-Meanwhile, my health was rapidly deteriorating. Shiff and personnel office began to make numerous summons, forcing me to accept those unequal terms. As I was coerced and humiliated during those meetings, I asked Gloria DiGennaro, the assistant director of personnel where to file grievance. She replied:"There is no grievance office. Personnel is the grievance office and we do whatever the boss says."

10/29/96- DiGennaro called for meeting as soon as I stepped in the lab. She insisted to meet right away even I told her that I had things to do first and asked to meet later on. She said she was the one to call for meetings, not me. I told her I'd need a counsel to go with me the way the meetings were. That never happened. I was too ill.

11/1/96-MRI of abdomen, requested by doctor.

11/10/96-Diagnosed with early liver cirrhosis.

11/15/96-Acute bronchitis, fever, fatigue, sore throat, severe cough, and shortness of breath....etc., I was terribly ill and couldn't go to work.

11/20/96-Employment terminated. I collapsed.

12/96-Ms. Xikis, emphasized that I report to unemployment office and gave me a slip for proof of employment.

ARGUMENT

POINT I
THE DISTRICT COURT WAS NOT PROPER IN GRANTING SUMMARY JUDGMENT BECAUSE THE EXISTENCE OF EXCEPTIONAL CIRCUMSTANCES AND TOLLING IS WARRANTED WHEN THERE IS AN ISSUE OF THE STATUTORY FILING PERIOD.

A. Governing Legal Principles

1. Applicable Summary Judgment Standard

Summary judgment is proper when there is no genuine issue of material fact. Material facts are facts that "might affect the outcome" of the action; a genuine issue of fact is created by evidence upon which a reasonable jury could return a verdict for the nonmoving party.

The movant's burden is satisfied if it can point to the absence of evidence to support an essential element of the nonmoving party's claim.

Measured against these standards, the evidence concerning the claims' timeliness established triable issue.

2. Exceptional Circumstance

Tolling has been permitted in cases of post- traumatic stress disorder, when coupled with other symptoms or illness, as one New York court explained (see quote on p.A-27 , Appendix C). The University's exceptional misconducts resulted in the cause(the University)-specific PTSD. Exceptional circumstance thus existed. It was best explained

in Honorable Judge Scheindlin's lenient and righteous Opinion and Order of February 7,2001 (p-19, Appendix C).

Twenty years after my mother passed away, several times in Chinatown, I found myself following an elderly lady for blocks before she entered her building. When she turned around, realizing that she was a stranger, I burst into tears. I continued searching. My mother couldn't have left me. I haven't said good-bye to her.

This is also reflected in the cause-specific PTSD demonstrated in the following events:

i). 10/3/00-The attempt to jump out of the window upon seeing the University campus unexpectedly.

ii).11/17/02-Dr. Chiba, a guest investigator of the University twenty years ago, who I worked together in the same lab, after several attempts to see me, I forced myself to greet her at my home. We were very good friends. After her two years' stay in the States, I visited her in Japan couple times. I stopped responding to her - and everyone else - since the termination. She was the first person I managed to pull myself together to meet from work (Except DiGennaro, the person who summoned meetings, coerced unequal terms, and affirmed that there was no grievance office, whose presence during the court appearances and deposition for Discovery severely hindered my already damaged ability to act normally). Friends are angels whom I haven't been near for long. The tremendous sense of shame altered my attitude entirely.

iii). 12/24/02- During a follow-up ultra sound exam monitoring my liver condition, the brief

conversation prompted the tending physician alerting me to seek psychiatric help.

iv). 12/28/02-A visit to the referred psychiatrist for a nearly 40 minutes' session with the suggestion of medication and counseling; among all the things and physical pain, I never mentioned employment. I know there is no cure for that.

Six years past. I failed to free myself from the trauma inflicted by my former employer. 300-day is never sufficient enough time for someone was hurt so badly, not to mention the physical disabilities which arised all the discrimination, to guard him/ herself.

There is no metaphysical doubt. These are facts.

B. Tolling Should Be Warranted Because The Incapability Of Protecting Legal Rights During The 300-day Statutory Filing Period

1. Incapability Due To Exceptional Circumstance

As elaborated in the above mentioned cause-specific PTSD, it alone is sufficient to establish the exceptional circumstance.

2. The Absence Of Evidence To Support An Essential Element Of The Nonmoving Party's Claim.

If 9/16/97 indeed was the 300-day limitation, the letter to TIAA to inquire about the status of my application to the long term disability benefit in August 1997, three months after I submitted, as opposed to what Mr. Weber assured me that it would only be a week or two for processing, was the only one I wrote. While the letters sent afterwards, beyond the 300-day limitation, they, first of all, were with all similar

contents or identical copies to two medical insurance coverages I purchased; secondly, they were non-adversary (which, TIAA later proved to be otherwise). In addition, I was told to apply for the coverage should I still be ill after short term disability benefit ended in six months. My, and may be all the other needed individuals with disabilities',perception for applying society security benefits was that is was merely a procedure to inform my disability, without mentioning that I was told of.

3. Due Diligence

While a mere failure to act diligently is not a basis for extending the 300-day filing period, diligence was never absent in my dictionary. I worked diligently for my career. I fought diligently against unlawful discrimination. I dragged my collapsed body into the unemployment line for Ms. Xikis had sincerely emphasized the importance to go, only being told right in the office that I should go to apply for disability benefit due to the fact that I was in no condition to work. Despite the terminal illness, I strived to do everything I was told to do. I pleaded to my husband to be sure to seek justice should I die. I tried to retain counsel but in vain due to the inability to breathe, speak, not to mention the excruciating pain to recollect. He never mentioned the time, or I wouldn't call for information myself, realizing that it was unbearable for me, physically and mentally, to touch it at that time. As Honorable Judge Scheindlin wrote:"oddly, it was only Tsai's discrimination claims against the University that she neglected and allow to expire.". Having to file suit pro se is like to put to death by dismembering the body. I was not ready then. I am still not ready now. But already I am in the

sanctuary of the Supreme Court. I just have to forget about myself. I have to do it. There are too many people submerged in this boundless sea of injustice. It is odd that I would allow it to expire. After all, justice is what I seek with my life.

These facts, in addition to the PTSD symptoms lingered until the present day, fully demonstrated my incapacitation to protect my legal rights. Tolling thus should be warranted.

4. Misrepresentation of EEOC

EEOC is not a party of this lawsuit. The voluminous cases cited by the University counsel, however, revealed the incredibly erroneous information EEOC has provided. It is an irresponsible human error. The occurrence too frequent; the suffer too unnecessary; and the consequences too catastrophic.

When I said "by all means" I'd try to file suit had EEOC not misinformed me, it showed my intention of acting diligently. It by no means meant that I was capable enough. It simply meant that while I was unable, I would plea an extension on filing instead of allowing it to expire. It was not contradicting.

What's really contradicting is when I"would pose threat to the health and safety to other individuals", (as indicated in the appellee's appendix, I was fired for unjustified reasons and lied to my insurance carrier.

Ignorance was the nature of EEOC's mistake and I have no intention to pursue the responsibility. Nevertheless, I feel compelled to pursue a further course of action: the issuance of a slip with guidelines of employees' rights upon harsh termination, as the slip of Record of Employment. It

would prevent a docketful of similar cases in the court, as well as serve as a restraint upon the transgressor and a warning to deter the commission of like offenses in the future.

POINT II
THE DISTRICT COURT OVERLOOKED THE POINT THAT TERMINATION OF TSAI'S EMPLOYMENT WAS NOT THE UNIVERSITY'S LAST DISCRIMINATORY ACT, THEREFORE, TSAI'S COMPLAINT WAS INDEED NOT TIME-BARRED

A. Termination Was Not The University's Last Discriminatory Act

1. The University Intervened My TIAA Disability Plan

The University terminated me on 11/20/96 during my illness and started my short term disability on 11/21/96. The policy changed from group to individual plan had altered the benefits significantly. When I actually applied (5/15/97) for the coverage after six months' short term disability benefit exhausted, TIAA turned me down(9/15/97) because my employer told them that I was terminated. When I was eventually represented by a counsel to pursue it in November, 1999, Ms. D. Grossman of Proskauer Rose LLP, representing the University's Long Term Disability Plan, also acted as attorney for defendant on the discrimination claims, asserted it.

2. "The Tenth Affirmative Defense"

"The Tenth Affirmative Defense : Upon information and belief, continued employment of plaintiff would pose a

direct threat to the health and safety of other individuals in the workplace.", contained in the Appendix of defendant-appellee, The Rockefeller University, page A-43, manifested the real reason behind the series of orchestrated practice of discrimination along the years. Having undo the puzzle in my mind why my work performance never spoke for me, I feel sad.

Under ADA§5.14 Safety Defense, :" The ADA requires the Secretary of the Department of Health and Human Services (DHHS) to review all infectious and communicable disease which may be transmitted through the handling of food and to publish an annual list of such disease.....an employer may refuse to assign or continue to assign such individual to a job involving the handling of food.....". Heptitis B virus is not included on that list, nor was my job involves food handling. Furthermore, the fact that the University, "comprehended" my eligibility for disability, not advising me of the accommodation of short term disability, fired me with wrongful reasons and further, lied to TIAA, resulting painful litigation and financial hardship. For all the illnesses I had, there was several months that my family, with two youngsters ages 8 and 6, did not have any health insurance.

Under the continuing violation doctrine, a limitations period does not commence until the last discriminatory act in furtherance of a continuous practice and policy of discrimination has taken place. The termination of my employment was not the University's last discriminatory act, therefore, the Complaint was indeed not time-barred.

3. Material Facts

While this is all true, there is a major oversight when

Complaint.

i) Not fully comprehending the scope of question#6, if it would consider discrimination occurred during the employment period only or beyond as well, I answered the question by indicating the status of my employment.

ii) This was further substantiated on the attachments of "Plaintiff's Opposition to Defendant's Motion to Dismiss", submitted on November 7, 2000. The University's continuous discriminatory acts on my LTD Plan went well into October, 2000. According to Hon. Judge Scheindlin, " Because plaintiff is proceeding pro se. , the factual allegations raised in Plaintiff's Opposition to Defendant's Motion to Dismiss ("Pl. Opp") will be treated as part of her Complaint." (see page A-23, Appendix C)

B. Settlement offer

Rule 68 required that a settlement offer reflect a good-faith attempt to settle. The offer of $20,000., as opposed to the calculated loss, which including back pay, retirement annuity benefit, and health insurance premium cost totaling approximately $220,000., not counting any compensation of mental anguish, the University never intended to prevent and correct any harassment. Forcing me to accept it intrinsically is the same to coerce me of the unequal terms. However, with it's mind set that I was contagious and determined to let me go, I often wonder : should I indeed agreed with the unequal terms, if I could keep that job; and what would the next assault be.

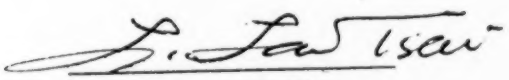
When an agreement was not reached, Judge Scheindlin ordered defendant to file motion and granted summary judgment.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Dated January 15, 2003

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 02-7253

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of September, two thousand and two.

PRESENT:

HON. RALPH K. WINTER, HON. ROBERT D. SACK, AND HON. SONIA SOTOMAYOR,
Circuit Judges.

LI-LAN TSAI, Plaintiff-Appellant, v.
THE ROCKEFELLER UNIVERSITY, Defendant-Appellee.

Appearing for Appellant: LI-LAN TSAI, pro se, Forest Hills, NY.

Appearing for Appellee: CAROLE O'BLENES, Proskauer Rose (Karen Stefflre, of counsel), New York, NY.

Appeal from the United States District Court for the Southern District of New York (Shira a. Scheindlin, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

Plaintiff-Appellant Li-Lan Tsai, pro se, appeals from the judgement of the United States District Court for the Southern District of New York (Shira A. Scheindlin, Judge) granting the Fed. R. Civ. P. 56 motion for summary judgment

of The Rockefeller University ("The University"), and dismissing Tsai's complaint, which raised claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. S2000e, et seq., and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12112-12117. Tsai was terminated on November 20, 1996, but did not file a charge with the Equal Employment Opportunity Commission ("EEOC") until October 14, 1999. In district court, Tsai alleged that she had not timely filed her EEOC charge because she suffered from physical and mental disabilities, and because an EEOC representative had erroneously informed her in 1997 that she had three years in which to file a lawsuit.

The district court concluded that Tsai had not shown that her disabilities prevented her from timely filing a charge with the EEOC because she was able to exercise various other legal rights during the 300-day time period. The court also noted that Tsai's statement that she would have timely filed a charge, had she known of the limitations period contradicted her claim that she was unable to file a charge due to her disabilities. The court held that there was no evidence to warrant equitable tolling based on the alleged misinformation provided by the EEOC. On appeal, Tsai reiterates the claims she raised in the district court.

We review a district court's grant of summary judgment de novo, focusing on whether the district court properly concluded that the moving party was entitled to judgment as a matter of law. Allstate Ins. Co. V. Mazzola, 175 F. 3d 255, 258 (2d cir. 1999). To pursue a claim under Title VII or the ADA in federal court in New York, the individual alleging discrimination must first assert those claims with the

EEOC or the equivalent state agency within 300 days of the allegedly discriminatory action. 42 U.S.C. S2000e-5 (e); 42 U.S.C. §12117 (a); Harris v. City of New York, 186 F. 3d 243, 247-48 (2d Cir. 1999). This requirement is not jurisdictional, but, like statutes of limitation, is subject to "waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). When a plaintiff's medical condition, which includes a mental disability, prevents her from complying with the statute of limitation, equitable tolling may be invoked. See Brown v.Parkchester S. Condos., 287 F.3d 58, 60 (2d Cir. 2002). For the reasons stated by the district court, however, we find that Tsai's disabilities did not warrant equitable tolling in this instance.

We have noted that it is "questionable" whether the EEOC' s actions can be a basis for equitable tolling where the EEOC is not a defendant. Vernon v. Cassadaga Valley Cent. Sch. Dist., 49 F. 3d 886, 891 (2d Cir. 1995). Tsai has not provided any evidence, such as the name of the representative or the date on which she spoke with the representative, to corroborate her assertion that an EEOC representative gave her erroneous information. See Johnson v. Al Tech Specialties Steel Corp., 731 f.2d 143, 146 (2d Cir. 1984). Moreover, there is no evidence that the EEOC engaged in any affirmative misconduct.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT
Roseann B. MacKechnie, Clerk
By:"s/_____"
Oliva M. George, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION AND ORDER 00 Civ. 329 (SAS)

LI-LAN TSAI, Plaintiff,
- against -
THE ROCKEFELLER UNIVERSITY, Defendant.

SHIRA A. SCHEINDLIN, U.S.D.J.

Plaintiff Li-Lan Tsai has sued her former employer, the Rockefeller University (the "University"), under the Americans with Disabilities Act of 1990, 42 U.S.C. §12112 et seq. ("ADA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). Although plaintiff was terminated on November 20, 1996, she did not file a charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") until October 14, 1999.

Plaintiff contends that the 300-day filing period imposed under Title VII and the ADA should be tolled and her charge deemed timely filed because: (1) for nearly three years she was unable to protect her legal rights, and (2) an unidentified EEOC employee misinformed her about the time period in which a lawsuit could be filed. Defendant has moved for summary judgment under Federal rule of Civil Procedure 56 (c) arguing that there are no exceptional circumstance that would warrant tolling the 300-day filing

period for over two years. For the following reasons, defendant's motion is granted and this case is dismissed.

I. FACTS

Tsai, a Chinese female, was hired by the University in 1978 as a research assistant. Amended Complaint ¶ 7. Plaintiff alleges that she is disabled due to Hepatitis B, Cirrhosis of the liver, a torn meniscus in her knee, as well as headache, fatigue, weakness and shortness pf breath. Id. ¶¶ 13, 42. Tsai claims that the University discriminated against her because of her disabilities as well as her race and gender, and then retaliated against her when she complained about the alleged discrimination. Id. ¶¶ 33-36. 43. The University terminated Tsai's employment on November 20, 1996. Id. ¶ 7.

A. Plaintiff's Pursuit of Her Legal Rights [1]

October 29, 1996, Tsai consulted an attorney about the problems she had been having with the University since July 1996. Defendant's rule 56.1 Statement ("Def. 56.1") ¶ 4: see also Deposition of Li-Lan Tsai ("Tsai Dep.", Ex. D to the Affidavit of Karen Stefflre, attorney for defendant, in Support of Defendant's Motion for Summary Judgment ("Stefflre Aff.") at 142-43. For example, plaintiff disputed her vacation

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1 The following facts are taken from defendant's Rule 56. 1 Statement because it contains facts based solely upon specific deposition testimony of plaintiff as well as plaintiff's writings and pleadings. Plaintiff's rule 56.1 Statement, on the other hand, denied all but three of defendant's factual allegations even though the evidence in support of many of these allegations is plaintiff's own deposition testimony and pleadings. See Klein v. National Life of Vermont, 7 F. Supp. 2d 223, 233 (E.D. N.Y.1998) (citing Trans-Orient Marine corp. v. Star Trading & Marine Inc., 925 F. 2d 566, 572 (2d Cir. 1991) ("the rule is well-settled in this circuit that a party may not, in order to defeat a summary judgement motion, create a material issue of fact by submitting an affidavit disputing his own prior sworn testimony."). Plaintiff's rule 56.1 Statement is also deficient in

days and the University's failure to raise her salary. Def. 56.1 ¶ 5; Tsai Dep. At 142-43. Plaintiff also felt that she was forced to attend too many meetings with the University's personnel department. Def. 56.1 ¶ 6; Tsai Dep. At 143. Plaintiff wanted an attorney to represent her at these personnel meetings because she "need[ed] someone who knows the law to go with me." Def. 56.1 ¶ 7; Tsai Dep. At 143, 184. However, due to her illnesses, plaintiff never had the opportunity to have the attorney she consulted actually appear on her behalf. Def. 56.1 ¶ 9; Tsai Dep. At 146-47.

Although Tsai was terminated on November 20, 1996, she waited nearly three years before filing a Charge of Discrimination with the EEOC. Def. 56.1 ¶ 12; Tsai Dep. At 245; Charge of Discrimination, Ex. B to the Stefflre Aff. During this three-year period, however, plaintiff exercised other legal right by, inter alia, appealing from adverse determination, consulting with retained counsel, and testifying on her own behalf. Specifically, Tsai pursued various legal rights in the following ways:

- Approximately two weeks after she was terminated, Tsai filed for unemployment insurance benefits in person with assistance from her husband. Def. 56.1 ¶ 13; Tsai Dep. At 192-193

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that it often contains long narratives and conclusions which are not supported with citations to admissible evidence. See *Ofudu v. Barr Labs., Inc.*, 98 F. Supp. 2d 510, 513 (S.D.N.Y.2000) (disregarding conclusory assertions without proper foundation); *Fernandez v. Deleno*, 71 F. Supp. 2d 224, 227(S.D.N.Y. 1999) (rule 56.1 statement disregarded where the party failed to include any evidentiary citations). Accordingly, the following facts remain undisputed despite allegations to the contrary contained in plaintiff's Rule 56.1 Statement. See *Gubitosi v. Kapica*, 154 F. 3d 30, 31 n.1 (2d Cir. 1998) (uncontroverted facts set forth in movant's rule 56.1 statement deemed admitted).

- On January 10, 1997, after her claim for unemployment insurance benefits was denied, Tsai applied for short-term disability benefits. Def. 56.1 ¶ 14; Tsai Dep. At 149.
- On April 24, 1997, Tsai completed and filed an application for social Security disability benefits. Def. 56.1 ¶ 16; Tsai Dep. At 130.
- In May 1997, plaintiff consulted– in person–with an attorney, Mark Brandoff, telling him about her alleged wrongful termination and that she wanted to sue the University. Def. 56.1 ¶¶ 17-18; Tsai Dep. At 130, 132, 137. Brandoff asked Tsai to send him the termination papers as well as other relevant documents. Def. 56.1 ¶ 19; Tsai Dep. at 133. Plaintiff failed to send Brandoff the requested documents. Def. 56.1 ¶ 20; Tsai Dep. At 134-35.
- On May 15, 1997, Tsai completed and submitted an application for long-term disability benefits. Def. 56.1 ¶ 21; Tsai Dep. At 151.
- On August 18, 1997, Tsai wrote a three-page handwritten letter to the long-term disability benefits and requesting an early determination of her claim. Def. 56.1 ¶ 23; Tsai Dep. At 152-53; letter dated August 18, 1997 to Mr. Weber, Ex. E to the Stefflre Aff.
- On September 15, 1997, Tsai's claim for long-term disability benefits was denied. See Amended Complaint filed by Tsai against the Rockefeller University Long Term Disability Plan Teachers Insurance & annuity Association ¶ 24, Ex. F to the Stefflre Aff. Thereafter, on November 8, 1997, plaintiff wrote a five-page handwritten letter to the long-term disability carrier appealing the adverse determination.

Def. 56.1 ¶ 26; Tsai Dep. At 158-59; Letter Dated November 8, 1997 to Mr. Weber, Ex. G to the Stefflre Aff.

- On December 3, 1997, Plaintiff wrote a four-page handwritten letter complaining that more information concerning her medical condition was required in order to process her appeal of the denial of long-term disability benefits. Dep. 56.1 ¶28; Tsai Dep. At 161-62; Letter Dated December 3, 1997 to Mr. Williams, Ex. H to the Stefflre Aff.
- On December 10, 1997, plaintiff wrote a two-page handwritten letter to the Social Security Administration requesting that her application be expedited. Def. 56.1 ¶ 30; Tsai Dep. At 166; Letter Dated December 10, 1997 to Ms. Landrigan, Ex. I to the Stefflre Aff.
- On January 21, 1998, plaintiff wrote another letter to the Social Security Administration seeking an expedited decision on her application for benefits. Def. 56.1 ¶ 34; Tsai Dep. At 179; Letter Dated January 21, 1998 to Ms. Landrigan, Ex. J to the Stefflre Aff.
- On January 21, 1998, Plaintiff wrote a three-page letter to the long-term disability carrier complaining that her appeal had not yet been decided and urging that time was of the essence. Def. 56.1 ¶ 34; Tsai Dep. At 177; Letter Dated January 21, 1998 to Mr. Williams, Ex. K to the Stefflre Aff.
- In April 1998 , after the Social Security Administration denied plaintiff's claim for social security benefits, Tsai consulted the law firm of Binder and Binder about handling an appeal of the decision. Def. 56.1 ¶ 36; Tsai Dep. At 170, 176.

- In April 1998, Tsai went to Binder and Binder's office and retained them to represent her before the Social Security administration. Def. 56.1 ¶ 37; Tsai Dep. At 117-18, 123-24.
- On January 22, 1999, Tsai wrote to Bill Lam Lee, acting Assistant Attorney General, Civil rights Division, Department of Justice, complaining about the University's treatment of her and asking for his assistance. Def. 56.1 ¶ 38; Tsai Dep. At 181, 252; Letter Dated January22, 1999 to Mr. Lee, Ex. L to the Stefflre Aff.
- On May 25, 1999, Tsai personally appeared at an administrative hearing before the Social Security Administration to testify in support of her appeal. Def. 56.1 ¶ 40; Tsai Dep. At 254. Tsai was represented by Binder & Binder at the hearing. Def. 56.1 ¶ 41; Tsai Dep. At 124-25.
- Sometime in 1999, Tsai discussed her claims against the University with three different attorneys. Def. 56.1 ¶ 42; Tsai Dep. At 250. Each attorney told Tsai that her claims against the University were time-barred because she had not filed a charge of discrimination with the EEOC within the 300-day filing period. Id.

B. Plaintiff's Contact with the EEOC

After learning of the EEOC some time in 1997, plaintiff telephoned to inquire about suing the University for employment discrimination. [2] Def. 56.1 ¶¶ 47-49; Tsai Dep. At 238, 240. According to Tsai, the EEOC representative informed her that she had three years to bring a lawsuit but

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2 Plaintiff could not recall whether she called the EEOC before or after the 300-day filing period expired. Tsai Dep. At 240.

said nothing else.[3] Def. 56.1 ¶ 50; Tsai Dep. At 243. Plaintiff does not know the name or title of the person with whom she spoke. Def. 56.1 ¶ 51; Tsai Dep. At 240.

Plaintiff did not contact the EEOC again until October 14, 1999, when she went there to file a Charge of Discrimination against the University.[4] Def.56.1 ¶ 53; Tsai Dep. At 244-45. The EEOC dismissed plaintiff's claims as time-barred and issued a right-to-sue letter on October 21, 1999. See Dismissal and Notice of Rights, Ex. A to the amended Complaint. Plaintiff filed a pro se complaint with this Court on January 18, 2000.

II. **Discussion**

A. Summary Judgment Standard

Rule 56 of the Federal rules of Civil Procedure provides for summary judgment " if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). "An issue of fact is 'material' for these purposes if it 'might affect the outcome of the suit under the governing law[,]' [while] [a]n issue of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Konikoff v. prudential Ins. Co. Of Am.*, 234 F. 3d 92, 97 (2d Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986))

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3 Plaintiff does not know why the EEOC misinformed her about the time period in which to file a Charge of Discrimination. Def. 56.1 ¶ 54; Tsai Dep. At 249. Had plaintiff known of the 300-day period, she would have tried to timely file with the EEOC. Def 56.1 ¶ 56; Tsai Dep. At 104.

4 Plaintiff alleged disability discrimination and retaliation but did not allege race or sex discrimination. Ex. B to the Stefflre Aff.

In assessing the record to determine whether genuine issues of material fact are in dispute, a court must view the evidence "in the light most favorable" to the non-movant. See *Breland-Starling v. Disney Publishing Worldwide*, 166 F. Supp. 2d 826, 829 (S.D.N.Y. 2001) (citing *Anderson*, 477 U.S. at 255). A court must resolve all ambiguities and draw all reasonable factual inferences in favor of the non-moving party. *SeeParkinson v. Cozzolino*, 238 F. 3d 145, 150 (2d Cir. 2001). "Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact, once such a showing is made, the non-movant must 'set forth specific facts showing that there is a genuine issue for trial.'" *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000)(quoting *Anderson*, 477 U.S. at 256). However, the non-moving party may not "rest upon... mere allegations or denials." *St. Pierre v. Dyer*, 208 F.3d 394, 404 (2d Cir. 2000). "Statements that are devoid of any specifics, but replete with conclusions are insufficient to defeat a properly supported motion for summary judgment." *Bickerstaff v. Vassar Coll.*, 196 F. 3d 435, 452 (2d Cir. 1999), cert. Denied, 120 S. Ct. 2688 (2000); see also *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998) ("If the evidence presented by the non-moving party is merely colorable, or is not significantly probative, summary judgment may be granted.") (quotation marks, citations, and alterations omitted).

B. The 300-Day Filing Period

Timely filing of a charge of discrimination with the EEOC is a prerequisite to filing a Title VII or ADA complaint in federal court. 42 U.S.C. § 2000e-5b (Title Vii); 42 U.S.C. § 12117 (a) (ADA). "In states such as New York that have an agency with the authority to address charges of discriminatory employment practices, the statute of

limitations for filing a charge of discrimination with the EEOC is 300 days."[5] *Butts v. City of New York Dep't of Hous., Pres. and Dev.*, 990 F. 2d 1397, 1401 (2d Cir. 1993) (finding EEOC filing period to be 300 days in New York). A charge may be filed with the EEOC either in person or bymail. See 29 C.F.R. § 1601.8. When the plaintiff fails to file a timely charge with the EEOC, a subsequent civil action is generally time-barred. See *Contes v. City of New York*, No. 99 Civ. 1597 WL 500140, at *6 (S.D.N.Y. July 14, 1999) (dismissing title VII action where plaintiff failed to file EEOC charge within 300 days after alleged unlawful employment practice); *Crawford v. New York City Bd. Of Educ.*, No. 99 Civ. 925, 1999 WL 107249, at *2 (S.D.N.Y. Nov. 29, 1999) (dismissing ADA claim where plaintiff failed to comply with 300-day filing requirement), aff'd, 225 F. 3d 645 (2d Cir. 2000).

The last discriminatory conduct alleged by plaintiff occurred on November 20, 1996, the date on which the University terminated her employment. Therefore, the 300-day filing period expired on September 16, 1997. Plaintiff did not file a charge of Discrimination with the EEOC until October 14, 1999, two years and one month after the 300-day filing period expired. In these circumstances, plaintiff must come forward with evidence of exceptional circumstances that would justify tolling the 300-day filing period. *See Miller v. International tel. & Tel. Corp.*, 755 F. 2d 20, 24 (2d Cir. 1985) (placing the burden of showing extraordinary circumstances justifying equitable tolling in an employment discrimination action on the plaintiff-employee); *Braham v. state Ins. Fund*, No. 97 Civ. 7121, 1999 WL 14011, at *3 (S.D.N.Y. Jan. 14, 1999)

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5 Title Vii and the ADA have the same 300-day filing deadline. See *Sahu v. Mayo Found.*, No. 00-1216MN, 2001 WL 515077, at *1 (8th Cir. May 16, 2001).

("A Plaintiff seeking to toll the statute of limitations on equitable grounds such as illness bears the burden to show that the limitations period should be extended."). In sum, plaintiff has failed to meet this burden.

C. Tolling is Not Warranted Because Plaintiff Was Capable of Protecting Her Legal rights During the 300-Day Filing Period

The Second Circuit has recognized that the time limits established by Title Vll and the ADA are "analogous to a statute of limitations, and [are] therefore, considered subject to waiver, estoppel, and equitable toling." *Downey v. Runyon, 160* F. 3d 139, 146 (2d Cir. 1998). Equitable tolling may, in certain circumstances, excuse a failure to follow the filing requirements of Title Vll and the ADA. *Briones v. Runyon*, 101 F. 3d 287, 290 (2d Cir. 1996). However, the filing period "may be tolled for equitable reasons only in "exceptional circumstances.'" *Braham*, 1999 WL 4011, at *4. Such exceptional circumstances may exist where a plaintiff was unable to protect her legal rights or was affirmatively misled by the EEOC as to the filing period.

Illness may constitute an "exceptional circumstance" for purposes of tolling only when it is so severe as to prevent the party from pursuing his or her legal rights. *Lloret v.Lockwood Greene Eng'rs Inc.*, No. 97 Civ. 5750 WL 142326, at *2 (S.D.N.Y. Mar. 27, 1998). Accordingly, courts have repeatedly refused to apply equitable tolling where a plaintiff has evidenced an ability to pursue his or her legal rights during the relevant period. *See Braham*, 1999 WL 14011, at *4 (tolling unwarranted where plaintiff filed a judicial action during the filing period); *Chalom v. Perkins*, No. 97 Civ. 9505, 1998 WL851610, at *6 (S.D.N.Y. Dec. 9, 1998) (no tolling based on illness where plaintiff filed an administrative complaint

during the filing period); *Lloret*, 1998 WL 142326, at *4 (tolling not warranted where plaintiff who was suffering from depression filed bankruptcy claim during filing period); *Pauling v. Secretary of the Dep't of Interior*, 960 F. Supp. 793, 804 n.6 (S.D.N.Y. 1997) (tolling not appropriate where plaintiff filed for workers' compensation benefits during filing period); *Sanders v. Transit Workers Union, Local 100 AFL-CIO*, No. 91 Civ. 6320, 1995 WL77916, at *5 (S.D.N.Y. FEB.23, 1995) (time period not tolled where plaintiff filed a pro se lawsuit during the filing period).

Here, plaintiff pursued various legal rights in a number of ways. For example, during the 300-day filing period, plaintiff applied for unemployment insurance benefits. After her claim for unemployment benefits was denied in January of 1997, she applied for short-term disability benefits. In April of 1997, plaintiff applied for social Security disability benefits and pursued this claim by writing several letters to the Social Security Administration. The following month, Tsai asserted a claim for long-term disability benefits and pursued that claim by writing several letters to the insurance carrier. In May 1997, still well within the 300-day filing period, plaintiff consulted an attorney - in person, at his office-about bringing a discrimination suit against the University.

These actions clearly negate Tsai's argument that she was too incapacitated to pursue her legal rights during the 300 days following the termination of her employment. Moreover, plaintiff testified that had she known of the 300-day filing period, she would have attempted to file within the statutory period. This admission contradicts Tsai's argument that she was incapable of pursuing her discrimination claims against the University.

Oddly, it was only plaintiff's discrimination claims against the University that she neglected and allowed to expire. As a matter of law, however, a mere failure to act diligently is not a ground for extending the 300-day filing period. See, *e.g.*, *Torre v. Columbaia University*, No. 97 Civ. 981, 1998 WL 386438, at *8 (S.D.N.Y. July 10, 1998) (finding tolling not applicable where plaintiff failed to act diligently), *aff'd*, 189 F. 3d 462 (2d Cir.1999); *South v. Saab Cars USA, Inc.*, 28 F. 3d 9, 11 (2d Cir. 1994) ("[A] plaintiff's failure to act diligently is not a reason to invoke equitable tolling.").

D. There Is No Evidence to Warrant tolling the Statutory filing Period Based on Alleged Statements by the EEOC

Plaintiff's alternative argument for tolling - that she relied on a statement by the EEOC to the effect that she had three years to commence an action - is also insufficient to toll the requirement for filing a timely EEOC charge. [6] Because the EEOC is not a party to plaintiff's action, it is doubtful whether its actions can create a right to equitable tolling. *See vernon v. Cassadaga Valley Cent. Sch. Dist., 49 F. 3d 886, 891 (2d Cir.1995)* (questioning whether acts of the EEOC can trigger equitable tolling where the federal government is not a defendant); *Angotti v. Kenyon & Kenyon*, 929 F. Supp. 651, 656 (S.D.N.Y. 1996) (acknowledging that, after *Vernon*, tolling is apparently not available based on Statements by EEOC Unless the EEOC is a defendant).

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6 This argument may be completely without merit depending on when plaintiff first telephoned the EEOC. If plaintiff contacted the EEOC after the 300-day period run, the information conveyed to her, whether right or wrong, was immaterial. However, there is no evidence in the record as to when plaintiff called the EEOC. Accordingly, the following discussion assumes that plaintiff called within the 300-day period

Assuming, *arguendo*, that the limitations period can be tolled based on statements by a non-party, no such extension is warranted here because plaintiff has not established that the statement allegedly made to her by the EEOC constituted affirmative misconduct aimed at causing her to forgo her legal rights. *See Long v. Frank*, 22 F. 3d 54, 58-59 (2d Cir. 1994) (holding that tolling is inappropriate in a case of a misrepresentation by the EEOC absent evidence of " affirmative misconduct").[7] Plaintiff has admitted that she does not know why the EEOC allegedly gave her incorrect information about the filing period. Moreover, plaintiff has not submitted any evidence that the EEOC engaged in affirmative misconduct to cause her to forgo her legal rights.

Plaintiff cannot even offer any evidence to support her allegations that the EEOC misinformed her because she does not know the name of the EEOC representative with who she spoke. Plaintiff's case is thus similar to *Edmonston v.MGM Grand Air, Inc.*, 808 F. Supp. 197 (E.D.N.Y. 1992). There, in granting summary judgment for the employer, the court held that tolling was not warranted because the plaintiff, who was pro se when he spoke with the EEOC, "provide[d] no evidence other than his affidavit to support his assertion of misleading by the EEOC." 808 F. Supp. at 204.

Conaway v. control Data Corp., 955 F. 2d 358 (5th Cir. 1992), is also instructive. In *Conaway*, the plaintiff urged the court to toll the filing deadline for his age discrimination claim, stating that he had been misled by the EEOC regarding the time for filing a charge. Id. At 362-63. Specifically, the

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7 The Second Circuit has held that the doctrine of equitable tolling was created to protect claimants in cases where the defendant's intentional and fraudulent misconduct caused them to be unaware of, and thus lose, their legal rights. See Long, 22 F. 3d at 58-59.

plaintiff alleged that, during a telephone call with the EEOC, she was told that he could file suit within two years from the date of the discrimination or three years if the discrimination was intentional. Id. At 362. The plaintiff argued as does Tsai, that he was misled by virtue of the EEOC"s failure to tell im that he had 300 days to file an administrative charge. Id. at 363-63. He did not, however, present any evidence to corroborate his allegations.

The Fifth Circuit held that "the alleged incomplete oral statements made by the EEOC to [plaintiff] during a telephone conversation will not support equitable tolling." Id. at 363. The court noted that the EEOC entertains numerous calls every day and "[I] t would be virtually impossible for the EEOC or a defendant to rebut a plaintiff's unsupported allegation that the EEOC provided incomplete information in a telephone conversation." Id. Accordingly, tolling was not applied. For the same reasons, tolling is not warranted here.

In sum, plaintiff cannot invoke the tolling doctrine based on a misstatement allegedly made by the EEOC because she has offered no admissible evidence that the EEOC purposefully failed to advise her of the applicable filing requirements in order to interfere with her legal rights. Absent admissible evidence corroborating plaintiff's allegations, tolling cannot save plaintiff's complaint which must be dismissed as time-barred. *See, e.g., Carrasco v. New York City off-track betting Corp., 858 F. Supp.* 28, 32 (S.D.N.Y. 1994) (rejecting tolling argument based on plaintiff's unsupported contention that on an unspecified date she telephoned the EEOC and was misinformed about the time period in which she could file a charge), aff'd, 50 F. 3d 3 (2d Cir. 1995); cf. *Chappell v. emco Machine Works Co.*, 601 F. 2d 1295, 1303 (5th Cir. 1979) (no tolling where plaintiff relied on erroneous representations by state agency that complaint had

been filed with the EEOC).

III. CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is granted and this case is dismissed. The Clerk of the Court is directed to close this case.

SO ORDERED:

By:"s/_____"
Shira A. Scheindlin
U. S. D. J.

Dated: New York, New York
February 14, 2002

- Appearances -

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
OPINION AND ORDER
00 Civ. 329 (SAS)

LI-LAN TSAI, Plaintiff,
- against-
THE ROCKEFELLER UNIVERSITY

SHIRA A. SCHEINDLIN, U.S.D.J.:

Plaintiff Li-Lan Tsai, Proceeding pro se, brings suit against her former employer under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §12112 et seq., and Title VII of the Civil rights Act of 1964 ("Title VII"), 42 U.S.C § 2000e et seq., alleging retaliation, failure to accommodate, unequal terms and conditions of employment, and unlawful termination. Defendant, the Rockefeller University ("RU"), moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12 (c). For the following reasons, defendant's motion is denied.

I. FACTS[1]

Plaintiff began working for RU in September, 1978. *See* Letter dated June 10, 1993 ("6/10/93 Ltr.") at 1. In June of 1993, the Director of the laboratory Safety Department

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1 The facts are taken from plaintiff's pro se form Complaint and the numerous documents appended thereto. These documents consist, in part, of plaintiff's hand-written letters which are identifiable by date. Because these additional documents are not numbered, the letters will be referred to by date and the remaining documents by title.

informed plaintiff that funding for her position would be discontinued as of July 1, 1993. Plaintiff was assured by RU's then Assistant Director of Personnel, Ms. Mary Ann George, that even though her position had been eliminate, she would not be terminated and would remain on RU's payroll. *See* 6/10/93 Ltr. At 2. On June 24 1993, plaintiff was interviewed by Dr. Steven J. Shiff who offered plaintiff a position in his laboratory beginning August 16, 1993. See Letter dated August 16, 1993 ("8/16/93 Ltr.") at 1.

Shortly after she began working for Dr. Shiff, plaintiff missed approximately one work day per month. Her absence resulted from severe cough, sore throat and fever, caused by Hepatitis B. *See* Letter dated March 23, 1994 ("3/23/94 Ltr.") at 1-2; *see* also Letter from Dr. Steven J. Shiff dated March 23, 1994 at 1 ("Your absenteeism has become a regular occurrence, as you have called in sick at least one day per month since starting in mid-August. This is in addition to the frequent number of times you have requested and I have granted permission for you to leave early."). In August of 1996, plaintiff was denied a salary increase. *See* Letter from Dr. Steven J. Shiff dated August 8, 1996 ("I did not recommend you for an increase because of your poor overall attendance record and failure to adhere to University policy regarding reporting absences from work due to personal illness....[I] n order to continue your position as Research Assistant in my laboratory, you are expected to maintain good and regular attendance.").

In early November 1996, plaintiff was diagnosed with cirrhosis of the liver which may have been caused by occupational exposure to a liver carcinogen, xylene, which plaintiff used on a daily basis. *See* Letter dated January 17, 2000 ("1/17/00 Ltr.") at 1-2. On November 20, 1996, while

plaintiff was having a blood test, Dr. Shiff called her into his office and terminated her employment. *See id.* At 3; see also Letter from Dr. Shiff dated November 20, 1996 ("Shiff 11/20/96 Ltr."). In his letter, Dr. Shiff stated that "the unreliability of [plaintiff's] attendance due to belated requests for vacation days and unscheduled absences (many of which have surrounded scheduled time off) have not only affected [plaintiff's] performance but also had an adverse impact on the overall operation of the laboratory and hindered the progress of my work." Shiff 11/20/96 Ltr. At 1.

Approximately three years later, on October 14, 1999, plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") charging unlawful termination and retaliation. *See* Charge of Discrimination dated October 14, 1999. In addition to the allegation of unlawful termination, plaintiff also claims that defendant failed to accommodate her disability by ignoring a doctor's request that plaintiff be assigned light work. *See id; see* also Discriminatory Incidences Letter ("DI Ltr."), undated, at 2. Specifically, plaintiff claims that defendant forced her to transport carts "loaded with chemicals and solvent bottles" to and from a building located tow blocks from her place of employment. DI Ltr. At 2-3. Plaintiff also complains that she was denied the opportunity for knee surgery because it would have caused a further loss of work time, while a colleague, Jim Gugluzza, told plaintiff that he took three months leave at full pay to have similar surgery. *See* Letter dated August 8, 1996 ("8/8/96 Ltr.") at 1. The EEOC issued plaintiff a right-to-sue letter dated October 21, 1999. Plaintiff's Complaint is dated January 18, 2000.

II. Discussion

A. Motion to dismiss Standard

The standard applicable to a motion to dismiss under Rule 12(c) is the same as that under Rule 12 (b) (6). *See Irish Lesbian and gay Org. V. Giuliani,* 143 F. 3d 638, 644 (2d Cir. 1998). Dismissal of a complaint for failure to state a claim pursuant to rule 12 (b) (6) is proper only where "'it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim that would entitle [her] to relief.'" *ICOM Holding, Inc. V. MCI worldcom, Inc.,* No. 00-7660, 2001 WL 46675, at *1 (2d Cir. Jan. 22, 2001) (quoting *Harris v. City of New York,* 186F. 3d 243, 247 (2d Cir. 1999)). "At the rule 12 (b) (6) stage, '[t] he issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test.'" *Sims v. Artuz,* 230 F. 3d 14, 20 (2d Cir. 2000) (quoting *Chance v. Armstrong,* 143 F.3d 698, 701 (2d Cir. 1998) (internal quotation marks)). The task of the court in ruling on a Rule 12 (b) (6) motion is "'merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Sims, 230 F. 3d at 20 (quoting *Ryder Energy Distribution* Corp. *V. Merrill Lynch Commodities Inc.,* 748 F. 2d 774, 779 (2d Cir. 1984) (Internal quotation marks omitted)).

To properly rule on a 12 (b) (6) motion, the court must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the nonmoving party's favor.[2] *See ICOM Holding,* 2001 WL 46675, at *1. Nevertheless,

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2 In deciding a Rule 12 (b) (6) motion, the court must limit itself to facts stated in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference. See *Dangler v. New York City Off Track Betting Corp.,* 193 F. 3d 130, 138 (2d Cir. 1999).Furthermore, the Court may take judicial notice of reports of administrative bodies without

"[t] o survive a motion to dismiss, [plaintiff's] claims must be 'supported by specific and detailed factual allegations' not stated ' in wholly conclusory terms.'" *Friedl v. City of New York*, 210 F. 3d 79, 85-86 (2d Cir. 2000) (quoting *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983)). Because "most pro se plaintiffs lack familiarity with the formalities of pleading requirements, [courts] must construe pro se complaints liberally, applying a more flexible standard to evaluate their sufficiency."*Lerman v. Board of Elections in the City of New York*, 232 F 3d 135, 140 (2d Cir. 2000) (citing *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) and *Haines v.Kerner*, 404 U. S. 519, 520-21 (1972)). Thus, dismissal is "'appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief.'" *Friedl*, 210 F. 3d at 83 (quoting *Harris*, 186 F. 3d at 250 (internal quotation marks omitted)). "'This rule applies with particular force where the plaintiff alleges civil rights violations or where the complaint is submitted pro se.'" *Cruz v. Gomez*, 202 F. 3d 593, 596 (2d Cir. 2000) (quoting *Chance*, 143 F3d at 701).

Because plaintiff is proceeding pro se, the factual allegations raised in Plaintiff's Opposition to Defendant's Motion to Dismiss ("pl. opp.") will be treated as part of her Complaint. See *Gill v. Mooney*, 824 f. 2d 192, 195 (2d Cir. 1987) (Considering pro se plaintiff's affidavit in reviewing district court's dismissal of claim); *Donahue v. United States Dep't of Justice*, 751 F. Supp. 45, 49 (S.D.N.Y. 1990) ("The policy reasons favoring liberal construction of pro se pleadings warrant the Court's consideration of the allegations contained in plaintiffs' memorandum of law, at least where those

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converting a motion to dismiss into one for summary judgment. See McBride v. Routh, 51 F. Supp. 2d 153, 155 (d. Conn. 1999).

allegations are consistent with the allegations in the complaint.").

B. Statute of Limitations

"In states such as New York that have an agency with the authority to address charges of discriminatory employment practices, the statute of limitations for filing a charge of discrimination with the EEOC is 300 days."[3] *Butts v. City of New York Dep't of Hous., Pres. and Dev.*, 990 F.2d1401(2dCir.1993). And a plaintiff who fails to file a timely charge with the EEOC is generally barred from bringing a claim of discrimination in federal court. Id. It is well established, however, that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982).

The principle underlying the filing requirement is "'to give prompt notice to the employer,' thereby encouraging conciliation where possible." *Snell v. Suffolk County*, 782 F. 2d 1094, 1101 (2d Cir. 1986) (quoting *Zipes*, 455 U.S. AT 398). *See* also *Levy v. Roemer*, No. 97 Civ. 4016, 1998 WL 193191, AT *1 (S.D.N.Y. apr. 22, 1998). However, the Supreme Court has recognized the need for flexibility as the "'remedial purpose of the [civil rights] legislation as a whole' would be defeated if aggrieved plaintiffs were absolutely barred from pursuing _

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3 Title VII, the Age Discrimination in employment Act of 1967 ("ADEA"), 29 U.S.C.§ 621 et seq., and the ADA, all have the same 300 day filing deadline. See *Braham v. State Ins. Fund*, No. 97 Civ.7121, 1999 L 14011, at *2 (S.D.N.Y. Jan 14, 1999) (ADEA and Title VII have the same exhaustion requirement); Lloret v. Lockwood Greene Engineers, Inc., No. 97 Civ. 5750, 1998 W142326 (S.D.N.Y. Mar. 27 1998) (ADA and ADEA have same 300 day limit).

judicial remedies by reason of excusable failure to meet the time requirement." *Johnson v. Al Tech specialties Steel Corp.*,731 F. 2d 143 (2d Cir. 1984) (quoting *Zipes*, 455 U.S. AT398). *See* also *wiliams v. Salvation Army*, 108 F. Supp. 2d 303, 308 n.6 (S.D.N.Y. 2000); *Timbol v. Commerciala Bank of Kuwait*, No. 99 civ. 1891, 2000 WL 282886, AT *3 (S.D.N.Y. Mar. 15 2000). Furthermore, "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. .Pullman Co.*, 404 U.S. 522, 527 (1972). *See* also *Hart v. J.T. Baker Chem. Co.*, 598 F. 2d 829 (3dCir. 1979) (it is "reasonable for courts to be flexible in appropriate cases when reviewing failures by aggrieved persons to comply with procedural technicalities").

C. Equitable Tolling

1. Mental and Physical Condition

Plaintiff seeks to toll the 300 day limitations period because of a combination of mental and physical infirmities. In her Complaint, Plaintiff states that after her termination she was not even able to tend to her two young children due to her physical illness and a "nervous break-down due to the unjustified termination." See Letter dated January 17, 2000 ("1/17/00 Ltr."). In addition to her allegations of physical fatigue and mental exhaustion, plaintiff has recited facts indicating a possible post-traumatic stress disorder. Specifically, plaintiff reports that while her mother died in 1980, she could not mention her mother's name until nine years later, when she herself became a mother. *See* Pl. Opp. At 1. Plaintiff's termination caused her to relive the pain she felt after her mother's death. *See* id. At 2. According to plaintiff, she could not "think, speak or even pronounce the word 'Rockefeller.'" Id. Apparently, plaintiff's mental turmoil

continues unabated. Plaintiff reports that when she visited her sister in the hospital on October 3, 2000, she had the urge to jump out the window upon seeing the RU campus. *See id.* At 4. And while plaintiff admits to informally consulting an attorney in May of 1997, it was extremely painful for her to recall the "tortuous" process of termination.[4] Id. at 6.

The Second Circuit has recognized that the "question whether a person is sufficiently mentally disabled to justify tolling of a limitation period is ... highly case-specific." *Boos v. Runyon*, 201 F. 3d 178, 184 (2d Cir. 2000). *See also Canales v. Sullivan*, 936 F. 2d 755, 756 (2d Cir. 1991) ("mental impairment may warrant equitable tolling of the statute of limitations under some circumstances"). The question of tolling, which is limited to exceptional circumstances and decided by principles of equity, is guided by state law. *See Llorett*, 1998 WL 14232, at *2 (citing *Biester v. Midwest Health Serves., Inc.*, 77 F. 3d 1264, 1268 (10th Cir. 1996)). In New York,

> the toll for insanity is narrowly interpreted and extends only to those individuals who are unable to protect their legal rights because of an overall inability to function in society. The disability must be of such a nature that plaintiff is unable to manage [her] business affairs and is incapable of comprehending and protecting [her] legal rights and liabilities.

Hedgepeth v. Runyon, No. 96 Civ. 1161, 1997 WL 759438, at *4 (S.D.N.Y. Dec. 10, 1997) (internal quotation marks and citations omitted). *See also Braham*, 1999 WL 14011, at *3 ("Illness may be an exceptional circumstance when it has prevented the party from pursuing her legal rights."); *Graboi*

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4 What was actually accomplished, if anything, during this consultation is questionable given that plaintiff was unable to complete a sentence due to shortness of breath and fatigue. SeePl. Opp. At 6.

v. Kibel, 432 f. Supp. 572, 579 (S.D.N.Y. 1977) (purpose of tolling is to relieve a plaintiff from the strict time restrictions who, because of mental illness, lacks the ability or capacity to pursue lawful rights).

Tolling has been permitted in cases of post-traumatic stress disorder, when coupled with other symptoms or illnesses. As one New York court explained:

> Post-traumatic stress disorder is a clinically diagnosed mental disorder in which the victim Avoids situations that stimulate recall of traumatic events or experiences. The victim attempts to repress psychologically unacceptable experiences until a later time in Life when it might be possible to cope with them. While mere repression may be insufficient to toll the Statute of Limitations, where the repression is but one of a bundle of claimed injuries the totality of which, if established, would indicate an overall inability to function in society then the Statute of Limitations will be tolled.

Anonymous v. Anonymous, 584 N.Y.S. 2D 713, 720-21 (Sup. Ct. Suffolk Co. 1992). Judge Arthur Spatt quoted anonymous with approval when he held that the severity of a mental disability is a fact question that cannot be decided as a matter of law based solely on the pleadings. *See Wenzel v. Nassau County Police Dep't*, No. CV-93-4888, 1995 WL 836056, at *5 (E,D.N.Y. Aug. 5, 1995) ("In order to determine the extent of the alleged mental disability, it is necessary to consider all of the surrounding facts and circumstances which may be relevant to the plaintiff's ability to protect her legal rights.").

At this preliminary stage, Plaintiff has sufficiently

alleged a combination of physical and mental conditions to warrant tolling.[5] Plaintiff suffers from both physical and mental infirmities. Her mental condition, which does not appear to be limited to depression, is exacerbated by any mention of RU, her former employer. Thus, the fact that plaintiff was able to file for disability benefits in 1997, which is a non-adversarial process, does not necessarily refute her inability to file and EEOC charge. Filing an EEOC charge is an adversarial proceeding that forces a complainant to relive the memories of the alleged discriminatory treatment. [6] Plaintiff has adequately alleged that she was incapable of bringing an EEOC complaint following her termination, and thus may be entitled to equitable tolling. [7] Accordingly, defendant's motion to dismiss the Complaint as untimely is denied.

2. Alleged Misconduct by the EEOC

Plaintiff has alleged that she was told by EEOC personnel that the statute of limitations for a discrimination complaint is three years. See 1/17/00 Ltr. At 3. Plaintiff relied on this misstatement and chose to delay filing her complaint with the EEOC until her emotions were under control and her physical condition stabilized. *See* Pl. Opp. At 6-7. Drawing

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5 This holding is not undermined by the fact that plaintiff filed an application for Social Security disability benefits on April 24, 1997. In Hedgepeth, tolling was not warranted because plaintiff sought disability retirement benefits in the months between her terminatin and the filing of her EEOC charge. See 1997 WL 759438, at *5. In that case, plaintiff complained of depression without any accompanying physical illness. See id. At *4. Moreover, Hedgepeth was a summary judgment decision where plaintiff offered little evidence of any mental disability. See id. at *5

6 Plaintiff did not testify at an administrative hearing until May 25, 1999, when she was represented by counsel.

7 This issue will undoubtedly be revisited on summary judgment based on a full record.

every inference in plaintiff's favor, this misstatement constitutes affirmative misconduct on the part of the EEOC.[8] In *Vernon v. Cassadaga Valley Cent. Sch. Dist.*, 49 F. 3d 886, 891 (2d Cir. 1995), the Second Circuit questioned whether equitable tolling would ever be appropriate when the EEOC is not a party. "First, unlike in *Long*, the EEOC was not even a party defendant here: it is therefore questionable whether its acts could lead to equitable toling." *Id.* (Emphasis added). Despite the *dicta* of *Cassadaga*, at least one court in this circuit has applied equitable considerations to deny a motion to dismiss based on the failure to file an EEOC charge. In *Angotti v. Kenyon & Kenyon*, 929 F. Supp. 651, 656 (S.D.N.Y. 1996), JudgeJohn G. Koeltl held:

> In the present case, however, the plaintiff was pro se at the time of her EEOC charge filing, although she had consulted informally with an attorney. And while the plaintiff indeed was an experienced attorney, there is evidence in this case that she was affirmatively mislead by the EEOC interviewer. Whether this plaintiff did in fact rely on the interviewer's misinformation is a question of fact that remains undetermined and cannot be resolved on a motion to dismis

Id. At 658. Here, unlike the plaintiff in *angotti*, the plaintiff

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8 Plaintiff's situation is thus distinguishable from Long v. Frank, 22 F. 3d 54, 58-59 (2d Cir. 1994), where the court held that ambiguity in a right-to-sue letter resulting from uncertainty in the law did not amount of affirmative misconduct on the government's part. Here, plaintiff was told she had three years in which to file her EEOC charge. This is not an ambiguous statement, it is flat out wrong. Moreover, unlike the plaintiff in Long, plaintiff relied on the misstatement in waiting to file with the EEOC.

was a lay person completely unfamiliar with the administrative process, thus making equitable consideration even more appropriate. [9] Accordingly, the EEOC's alleged misconduct in informing plaintiff that she had three years in which to file her charge serves as an alternative basis for equitable tolling.

D. Title VII Claim

Defendant also seeks to dismiss the Title VII claim because plaintiff only checked the disability" box in her form Complaint. Obviously, plaintiff is an Asian woman. In her Complaint, plaintiff alleged that a male, presumably a Caucasian, received preferential treatment regarding a three month surgical leave. See 8/8/96 Ltr. At 2. Plaintiff has thus pled a prima facie case of disparate treatment under Title VII. *See Tarshis v. Riese Org.*, 211 F. 3d 30, 36 (2d Cir. 2000) (in order to establish a prima facie case Title VII, a plaintiff must show that she was: (1) a member of a protected class, (2) qualified for and satisfactorily performing her job, (3) subjected to an adverse employment decision, and that (4) this adverse decision occurred under circumstances giving rise to an inference of discrimination) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Chambers v. TRM COPY Ctrs. Corp.*, 43 F. 3d 29, 37 (2d Cir. 1994)).

Nor does the fact that plaintiff omitted to check the appropriate boxes on her EEOC charge necessitate dismissal of her Title VII claim. As the Second Circuit has explained,

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9 The fact that plaintiff informally consulted an attorney does not give her constructive knowledge of the 300 day limitations period. Cf. Keyse v. California Texas Oil Corp., 590 F. 2d 45, 47 (2d Cir. 1978) (tolling improper if plaintiff was represented by counsel during the limitations period). This rule should not be extended to a single consultation with an attorney especially when a plaintiff is in poor physical and/or mental condition.

her Title VII claim. As the Second Circuit has explained,claims not mentioned in the initial EEOC charge will not be barred if they are "reasonably related" to the initial charge. *See Butts,* 990 F. 2d at 1401. *See* also *Brown c. Coach Stores, Inc.*, 163 F. 3d 706, 712 (2d Cir. 1998). The "reasonably related" doctrine thus permits claims not raised in the EEOC charge if the conduct at issue would fall with the "scope of the EEOC investigation which can be reasonably expected to grow out of the charge of discrimination." *Butts*, 990 F. 2d at 1402 (internal quotation marks omitted). A number of courts, however, have held that Title Vll claims are not reasonably related to ADA claims. *See,* e.g., *Aratari v. Genesee County Sheriff's Office*, No. 00-CV-0163E, 2000 WL 1047701, at *1 (W.D.N.Y. July 25, 2000) (dismissing ADA claim because it was not reasonably related to properly charged Title VII claim); *Herzog v. McLane Northeast, Inc.*, 999 F. Supp. 274, 276 (N.D.N.Y. 1998) (dismissing Title Vll claim where EEOC charge only alleged discrimination based on the ADA); *McNealy v. New York Pub. Library,* No. 96 Civ. 3023, 1997 WL 607548, at *3 (S.D.N.Y. 1997) (finding plaintiff's disability claim not reasonably related to her initial charge of race discrimination).

The "reasonably related" doctrine is best understood when one considers the purpose underlying the administrative exhaustion requirement - "to give the administrative agency the opportunity to investigate, mediate and to take remedial action to encourage settlement." *Herzog,* 999 F. Supp. At 276 (citing *Stewart v. United States Immigration and Naturalization Serv.*, 762 F. 2d 193, 198 (2d Cir. 1985)). These goals explain the rationale of the "reasonably related" exception - if the claim is one in which the EEOC would attempt to settle or negotiate as a matter of course, the employer is not prejudiced by its inclusion in a later filed

lawsuit despite its absence in the EEOC charge. All of this makes sense, however, only when the EEOC is attempting to first resolve the dispute between the parties without resort to litigation. Here, Plaintiff's EEOC charge is dated October 14, 1999, while her right-to-sue letter is dated October 21, 1999, exactly one week later. By summarily dismissing her complaint as time-barred, the EEOC never attempted to resolve plaintiff's grievances. Thus, whether plaintiff checked the "race," "sex," or "national origin" boxes on EEOC form 5 (Charge of Discrimination) is immaterial as no conciliation was ever attempted. Accordingly, defendant's motion to dismiss plaintiff's Title VII claim as untimely is denied.

III. CONCLUSION

For the reasons stated above, defendant's motion to dismiss is denied in its entirety. A conference is scheduled for February 26, 2001 at 4:30 p.m.

SO ORDERED:

By:"s/_____"

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

February 7, 2001

- Appearances -

Plaintiff (Pro Se):

Li-Lan Tsai

98-02 69th Avenue, Queens, New York 11375

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For Defendant:

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number(s): No. 02-7253

Petition for Rehearing

Motion for : Attachment of Appendix/Addendum

Set forth below precise, complete statement of relief sought: To reverse the summary judgment granted to the defendant from District Court.

Moving Party: Li-Lan Tsai, Pro Se-Appellant-Petitioner
98-02 69th Avenue
Forest Hills, N.Y. 11375
(718) 544-3208

Opposing Party: The Rockefeller University, Defendant-Appellee

Opposing Attorney : Carole O'Blenes & Karen Stefflre
Proskauer Rose LLP
1585 Broadway,New York, N. Y. 10036
(212) 969-3000

Court-Judge/Agency appealed from: Judge Scheindlin, The U.S. District Court, Southern District, N.Y.

File Date: September 26, 2002

- ORDER-

Before: Hon. Ralph K. Winter, Hon. Robert D. Sack, Hon. Sonia Sotomayor, Circuit Judges

IT IS HEREBY ORDERED that the motion be and it hereby is DENIED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

Oct. 8, 2002 by:"s/_____"
Date Arthur M. Heller, Motions Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
United State Court House
40 Foley Square
New York 10007

Roseann B, Mackechnie, clerk

At a stated Term of the United States Court of appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th Day of October two thousand two.

Present: Hon. Ralph K. Winter
Hon. Robert D. Sack
Hon. Sonia Sotomayor
Circuit Judges,

Tsai

v Docket No. 02-7253

The Rockefeller Univ.

A petition for panel rehearing having been filed herein by Li-Lan Tsai

Upon consideration thereof, it is

ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By:"s/_____"
Arthur M. Heller,
Administrative Attorney

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